TRIMHUA SHIPPING SDN. BHD.

v.

THE OWNERS OF THE SHIP JOHAN

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[ADMIRALTY ACTION IN REM NO. KG 1 OF 1991]
12 SEPTEMBER 1991

SHIPPING: *Action in rem - Security given by defendant - Counterclaim - Defendant seeking security from Plaintiff - Refusal - Application for stay of proceedings pending provision of security - Discretion of Court - Whether order for security required - Rules of the High Court 1980, O. 23, O. 70 r. 26, O. 74.*

As a result of a collision with the defendant's ship, (the '*Johan Pearl*') the Plaintiffs's ship, (the "*Seng Soon Chew*"), sank in the South China Sea. The Plaintiff commenced an action *in rem* and the defendant filed a defence as well as a counterclaim to the Plaintiff's claim.

The Plaintiff arrested the defendant's ship which was subsequently released following security given by the defendant's surety, SCB, in the form of a bail bond in the sum of RM1,000,000.

The defendant sought counter security from the Plaintiff in the sum of RM1,000,000. The Plaintiff refused to provide the said security.

By a summons in chambers under O. 70 r. 26 of the RHC, the defendant sought an order of stay of the proceedings until security by way of a non-recoverable banker's guarantee in the sum of RM1,000,000 or such sum as ordered by Court pending determination of the defendant's counterclaim in this action by payment into Court of such sums.

A further order was sought that in the event of the failure of the Plaintiff doing so, the Plaintiffs's action was to be dismissed.

It was the defendant's contention that there was a likelihood that the Plaintiffs would cease business shortly as the "*Seng Soon Chew*" was its only ship.

The Plaintiff's opposition to the summons in chambers was grounded primarily on procedure, namely that the defendant had presupposed that an order for security had already been granted, when in fact, it had not been.

Held:

[1] On the facts of this case, the defendant has satisfied the requirements of O. 70 and the Court has a discretion whether to make an order of stay in the circumstances of the case. The Court may stay proceedings in the first mentioned action until the security is given to satisfy any judgment given in favour of that party.

[2] The Court has no power under O. 70 r. 26 RHC to merely order security to be given but it can in a proper case grant a stay until security is given.

[3] Order 70 r. 26 and the case law cited clearly give the discretion to the Court in a proper case to make an order of stay pending security being given. As the defendant has provided the necessary security for the Plaintiffs's claim, the defendant is entitled to apply for stay until security is given as provided under O. 70 r. 26 of the RHC.

[Defendant's application allowed with costs.]

Cases referred to:
The Alexander [1883] 5 Asp MC 89 ***(cit)***
The Neptune [1919] PD and A Vol 88 ***(foll)***
The "Eleftheria" [1969] 1 Lloyd's Rep ***(foll)***
The "Carl Offerson" [1979] 2 MLJ 55 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 23, O. 70 r. 26, O. 74

For the Plaintiffs - Chong Siew Chiang; M/s. Chong Bros.
For the defendant - S.Y. Chan; M/s. Ee and Lim

JUDGMENT

Haidar Mohd. Noor J:

In this admiralty action *in rem* the Plaintiff, as owners of the ship "*Seng Soon Chew*", claim, *inter alia*, for damages caused to its ship as a result of a collision with the defendant's ship *"Johan Pearl"* on 5 December, 1990 in the South China Sea. The defendant filed a defence as well as a counterclaim to the Plaintiffs's claim. Both parties are within the jurisdiction of the Court.

The Plaintiff arrested the defendant's ship *"Johan"* which was subsequently released on 28 January 1991 following security being given by the defendant in the form of a bail bond in the sum of RM1,000,000. given by the defendant's surety, Standard Chartered Bank (see encl. 19). The defendant instructed its solicitors to ask the Plaintiff for counter-security in the sum of RM1,000,000 by way of a guarantee by the Plaintiffs's P & I Club (if any) or by a reputable bank or insurance company (see Exh. 'B' to encl. 39) in respect of its counterclaim. The Plaintiff refused to give the counter-security (see Exh. 'C' to encl. 39). As a result the defendant filed a summons in chambers on 28 March 1991 (encl. 39) under O. 70 r. 26 of the Rules of the High Court, 1980 (RHC) for an order of stay of the proceedings until security by way of a non-revocable banker's guarantee in the sum of RM1,000,000 or such sum as the Court deems fit is given by the Plaintiff to the defendant pending determination of the defendant's counterclaim in this action or by way of the Plaintiff paying into Court the sum of RM1,000,000. or such sum as the Court deems fit and for a further order that if the security deposit aforesaid is not given within 7 days or such time as the Court deems fit, the Plaintiffs's action shall be dismissed with costs to the defendant. The summons in chambers is supported by the affidavit of Geoffrey Teo, the director of the defendant company. The Plaintiff filed an affidavit in opposition through its Counsel (see encl. 55). The main ground of the defendant's summons in chambers is that the Plaintiffs's ship *"Seng Soon Chew"* has sunk and there are no other sister ships or assets of worth in the Plaintiff company. According to a search at the company registry the Plaintiff has only a share capital of RM250,000 and it is alleged that once the Plaintiff received from its insurance the compensation for total loss of the ship *"Seng Soon Chew"* there is every likelihood that the Plaintiff company might stop carrying on its business. Apart from denying the allegation that the Plaintiff company may cease operating its business once it received the compensation money, the Plaintiff's opposition to the summons in chambers is grounded primarily on procedure, that is, the defendant presupposes that an order for security has been already granted which in fact is not the case. It is then pertinent, in my view, to examine the relevant order on which the defendant relies in its application before the Court.

Order 70 r. 26 of RHC reads:

> Where an action *in rem*, being an action to enforce any such claim as is referred to in O. 11 r. 1(1)(i)(ii) and (iii), is begun and a cross action *in rem* arising out of the same collision or other occurrence as the first mentioned action is subsequently begun, or a counterclaim arising out of that occurrence is made in the first mentioned action, then:
>
> (a) if the ship in respect of or against which the first mentioned action is brought has been arrested or security given to prevent her arrest; but
>
> (b) the ship in respect of or against which the cross action is brought or the counterclaim made cannot be arrested and security has not been given to satisfy any judgment given in favour of the party bringing the cross action or making the counterclaim,
>
> **the Court may stay proceedings in the first mentioned action until the security is given to satisfy any judgment given in favour of the party.**
> (Emphasis added)

It would seem clear from the provisions of O. 70 r. 26 of RHC, the facts as submitted by Counsel for the defendant, with which I agree, that the defendant has satisfied the requirements of the said order. In other words, it would seem to be undisputed that the Court has a discretion to make an order of stay in the circumstances of the case but according to the Counsel for the Plaintiff the said order merely relates to stay **not security.** However, in my view, the wordings in the said order as emphasized by me above would seem to show that security is to be given if an order of stay of proceedings is made by the Court. The Counsel for the Plaintiff further submitted that as no order for security has been granted yet and no application for security has hitherto been made, the application is improperly placed before the Court and further alleged that the defendant seeks an easy way out and tries to obtain an order of security without placing the issue of security before the Court. Hence the Plaintiff claimed that it is an abuse of the process of the Court. He relied on O. 23 (relating to security for costs) and O. 74 (relating to security for claim). He further submitted that the only law which empowers the Court to order security before judgment is the Debtors Act 1956. With respect, I do not agree with such a contention as we are dealing with an order of stay pending security being given and not security *per se*. This is an action *in rem* and not *in personam.* The Orders relied on by the Plaintiff, to my mind, are therefore irrelevant.

I agree that the Court has no power under O. 70 r. 26 of RHC to merely order security to be given (see: *The Alexander* [1883] 5 Asp. MC 89) but it can in a proper case grant a stay until security is given. According to Hill J in *The Neptune* [1919] PD & A Vol. 88 at p. 96:

> ... the Court has no power to compel the giving of bail. At the most, in a proper case, it can either order the arrest of the ship or grant a stay until bail is given.

In this case the arrest of the Plaintiffs's only ship *"Seng Soon Chew"* is out of the question as it has sunk and the question is whether this is a proper case for an order of grant of stay until bail is given. In my view an order of stay if granted by the Court should be subject to terms as an order of stay alone cannot be left in a vacuum. In *The "Eleftheria"* [1969] 1 Lloyd's Rep. at p. 246, Brandon J said:

> The question whether to grant a stay or not, and if so on what terms, is one for the discretion of the Court. Having arrived at the clear conclusion which I have stated, I shall exercise my discretion by granting a stay, subject to appropriate terms as regards security.

The "Eleftheria" was quoted with approval by Chua J in *The "Carl Offersen"* [1979] 2 MLJ 55.

In my view, O. 70 r. 26 of RHC and the authorities clearly give the discretion to the Court in a proper case to make an order of stay pending security being given. The Plaintiff did not dispute that its only ship *"Seng Soon Chew"* has sunk and it has only a share capital of RM250,000. If the Plaintiff has any other ships then the defendant could properly apply for the arrest of the ships as security. The defendant has provided the necessary security for the Plaintiffs's claim. In the circumstances, it would appear that the defendant is entitled to apply for stay until security is given as provided under O. 70 r. 26 of RHC. The defendant here is not merely asking for security to be given as seemed to be the contention of the Counsel for the Plaintiff.

Having considered the circumstances of this case I am of the view that this is a proper case for the Court to exercise its discretion to order a stay of the proceedings pending security being given by the Plaintiff on the counterclaim. I therefore order that further proceedings of this action be stayed until the Plaintiff provide a reasonable security to the defendant on its counterclaim. In the absence of any evidence, it is best that I leave to the parties to work out the reasonable security. In the event of a failure to reach agreement on the reasonable security the parties are at liberty to apply to the Court for direction. Costs of the application to the defendant.

Also found at [1992] 1 CLJ 215